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In The

Supreme Court of the United States

OCTOBER TERM, 1969

No. [redacted] 85

ASSOCIATION OF DATA PROCESSING SERVICE ORGANIZATIONS, INC., and DATA SYSTEMS, INC.,

Petitioners,

vs.

WILLIAM B. CAMP, Comptroller of the Currency of the United States, and AMERICAN NATIONAL BANK AND TRUST COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled case on February 6, 1969.

CITATIONS TO OPINIONS BELOW

The opinion of the District Court, printed in Appendix A hereto, *infra*, pp. 13-22, is reported in 279 F.Supp. 675. The opinion of the Court of Appeals is presently unreported and is printed in Appendix B hereto, *infra*, pp. 23-33.

JURISDICTION

The judgment of the Court of Appeals was entered on February 6, 1969 (R. 12 and Appendix C) The jurisdiction of this Court is invoked under 28 U.S.C. §1254. The jurisdiction of the District Court was invoked by reason of a federal question arising under the National Bank Act, 12 U.S.C. §§ 21, et seq.

QUESTION PRESENTED FOR REVIEW

Whether independent data processing service organizations, whose sole business is to provide data processing services for the general business public, have standing to assert a claim that national banks are illegally offering competing data processing services.

STATUTES INVOLVED

The statutory provisions involved are portions of the Bank Service Corporation Act, 76 Stat. 1132, 12 U.S.C. 1861-1865 (Supp. V, 1964), National Bank Act, 12 U.S.C. §24, and the Administrative Procedure Act, 5 U.S.C. §702, which are printed in Appendix D hereto, *infra*, p. 35.

STATEMENT OF THE CASE

As petitioners' complaint was dismissed by the District Court on motion before trial and before any information was obtained by any party in pre-trial discovery proceedings, this statement of the case is necessarily limited to the pleadings on file (R. 1-11).

Petitioners are the Association of Data Processing Service Organizations, Inc. (referred to as "ADAPSO"), and an individual member of that Association (referred to as "Data Systems"). The members of ADAPSO are engaged in the business of performing data processing services for the general business community. For some time, the respondent

American National Bank and Trust Company of St. Paul, Minnesota, a national bank (referred to as "American Bank"), has been similarly engaged in the business of performing data processing services for the general business community. In fact, respondent American Bank, at the time petitioners began their action, was performing or preparing to perform such services for the Minnesota State Capitol Credit Union, with whom petitioner Data Systems had contracted to perform such services, and for Carlen Industries, Inc., with whom Data Systems had been negotiating regarding such services. Petitioners brought this action to have American Bank's data processing activities of this nature declared unlawful, to have them enjoined, and for damages resulting from these illegal activities.

Petitioners also sought declaratory and injunctive relief against the respondent Comptroller of the Currency (the "Comptroller"), as he had purported to authorize such activities in his 1966 ruling, which stated as follows:

> "Incidental to its banking services, a national bank may make available its data processing equipment or perform data processing services on such equipment for other banks and bank customers." *Comptroller's Manual* (October 15, 1966 ed.), par. 3500.

Petitioners have alleged, and for purposes of this petition these allegations must be accepted, that these activities by the American Bank and the above ruling by the Comptroller are illegal under the National Bank Act, United States Code, Title 12, Chapter 2, and that if these activities are continued under the umbrella of this ruling they will cause substantial and irreparable harm to petitioners.

Prior to trial, respondents moved to dismiss the complaint on the grounds that petitioners lacked standing to maintain this action. The District Court granted the motion, and the Court of Appeals affirmed the judgment of dismissal.

REASONS FOR GRANTING THE WRIT

1. The decision of the Court of Appeals in the present case directly and irreconcilably conflicts with the decision of the Court of Appeals for the First Circuit in *Wingate Corp. v. Ind. Nat. Bank*, No. 7186, decided March 27, 1969, attached hereto as Appendix E (p. 36, *infra*).

In the *Wingate Corp.* case, the First Circuit reversed the District Court decision (286 F.Supp. 770, D.Mass. 1968) that had held the plaintiff to be without standing. It was the District Court decision in *Wingate Corp.* which the Eighth Circuit cited as being in "direct accord" with its decision in the present case (App. B, p. 23, *infra*). That District Court decision has now been reversed by the First Circuit, creating the conflict with the Eighth Circuit.

The two cases are indistinguishable. In each, the plaintiff is a corporation involved in performing data processing services. In each, the defendants include a national bank and the Comptroller of the Currency. In each, the suit was to enjoin the national bank from performing data processing services for outside customers pursuant to authorization by the Comptroller. In each, the District Court dismissed the complaint before trial on the grounds of lack of standing. But the Eighth Circuit has affirmed its lower court action, while the First Circuit has reversed the decision of its District Court.

Not only are the two *decisions* diametrically opposed, but the two *opinions* set forth explicitly the divergent thinking that led to the contrary results. The First Circuit Court writes cogently and at length in support of its conclusion that statutory aid to standing is found in the Bank Service Corporation Act, 76 Stat. 1132, 12 U.S.C. 1864 (App. E, pp. 44-46, *infra*). By contrast, although petitioners argued at length in their brief before the Eighth Circuit that the Bank Service Corporation Act gave them standing, that Court of

Appeals rejected the argument in a footnote (App. B, fn. 12, *infra*, p. 32).

The reasoning of the First Circuit appears far more persuasive than the summary rejection of petitioners' position by the Eighth Circuit. Be that as it may, this square conflict, on an issue that is obviously of widespread importance, cannot be allowed to stand. It is not possible for the national banking system to function satisfactorily while this conflict remains unresolved.

2. The decision of the Court of Appeals in the present case is also directly in conflict with the decision of the Court of Appeals for the Fifth Circuit in *Saxon v. Georgia Ass'n of Ind. Ins. Agents, Inc.*, 399 F.2d 1010 (1968).

The *Insurance Agents* case is indistinguishable in principal from the present action. The plaintiffs were an association of independent insurance agents and individual members of the association. The defendants were a national bank and the Comptroller of the Currency. The action was to enjoin the national bank from engaging in the insurance business in cities of over 5,000 population and to invalidate the Comptroller's ruling which had authorized such activity.

Defendants raised the question of plaintiffs' standing to maintain the action, and the Court of Appeals held, contrary to the decision in the present case, that plaintiffs did have standing:

> "We find no fault with appellants' argument that the plaintiffs in the court below, who are licensed, professional insurance agents, have no legal right to be free from lawful competition by other licensed agents who are lawfully and properly empowered to engage in the insurance business, but they do have a legal right to be protected from *unlawful* competition by national banks." (399 F.2d at 1016.)

The court below recognized the conflict between its decision and that of the Fifth Circuit in the *Insurance Agents*

case, although its consideration of the latter case was once again limited to a footnote. (App. B, fn. 10, *infra*, p. 30.)

It is apparent from a review of the two cases that if the present petitioners had brought their action within the jurisdiction of the Fifth Circuit they would have prevailed upon the question of standing. It is a basic responsibility of the Supreme Court to eliminate such conflicts among the Courts of Appeals.

3. The question presented is of major importance, involving unsettled questions regarding the federal law of standing affecting a large class of potential litigants besides the immediate parties. The issue is whether competitors of national banks have standing to challenge allegedly illegal action by these banks and by the Comptroller of the Currency.

In recent years, national banks have invaded various fields of business activity not previously thought of as being encompassed within the business of banking. For example, banks have entered the data processing business (the present case and the *Wingate Corp.* case), the insurance business (the *Insurance Agents* case), the travel agency business (*Arnold Tours, Inc. v. Camp*, No. 7192, 1st Cir., March 27, 1969), the business of dealing in revenue bonds (*Baker, Watts & Co. v. Saxon*, 261 F.Supp. 247 (D.D.C. 1966), *aff'd sub. nom. Port of New York Authority v. Baker, Watts & Co.*, 392 F.2d 497 (D.C. Cir. 1968)), and the investment fund business (*Investment Co. Institute v. Camp*, 274 F.Supp. 624 (D.D.C. 1967)). In all of these cases, the questioned activities have been approved by the Comptroller of the Currency, the federal official responsible for supervising and controlling national bank activities. As the Comptroller has shown no inclination to restrict national banks from entering these fields, it has fallen to competitors in each area to bring the question of the legality of such bank activities to the courts. In each instance, the question of standing has been raised by

the defendant bank and the Comptroller. In three cases (*Baker, Watts*—revenue bonds; *Investment Co. Institute*—investment funds; *Georgia Insurance Agents*—insurance) the courts have held that a competitor has standing. In *Arnold Tours* (travel agency) the court held a competitor to be without standing. In the data processing field, as noted before, the courts have disagreed.

Such divergent treatment of the threshold question of standing in turn creates major uncertainties as to the substantive question of the rights of national banks to engage in these particular business activities. It is noteworthy that in each case cited earlier where the court *has* found standing and thus reached the substantive question, the bank activity and Comptroller's ruling have been held illegal.

4. The question here presented, although of major significance in relation to the field of banking, has, in addition, far broader implications extending throughout the entire area of federal jurisdiction. The wider issue involves problems of the extent to which a competitive interest supports standing to litigate questions of alleged illegal government action adversely affecting that competitive interest.

At present, federal law relating to this aspect of standing has not been resolved in a satisfactory manner.

> "Probably the largest category of cases that would be affected by interpreting the APA to confer standing on persons adversely affected would be the miscellaneous holdings that a competitive interest is not a basis for standing. Of the cases on this question during the past five years, perhaps about three-quarters uphold standing and only about a quarter deny standing. If the decisions are based on a rational principle explaining why a competitive interest sometimes supports standing and sometimes not, then changing the result in the quarter of the cases denying standing might be undesirable. Does the case law rest on some rational principle?

> "The answer is no, except to the extent that many cases do uphold standing when a statute indicates an intent to protect a competitive interest. In absence of such legislative intent, the results are largely fortuitous, as I shall try to demonstrate." Kenneth Culp Davis, *Standing: Taxpayers and Others*, 35 Chi. L. Rev. 601, 625 (1968).

Certainly, it is undesirable that the outcome of litigation in this area (or in any, for that matter) should depend on "fortuitous" circumstances. One of the primary responsibilities of the Supreme Court should be to establish guidelines for lower federal courts in the area of federal jurisdiction. This case represents an important and urgent opportunity to establish such guidelines.

Another commentator has reached the same conclusion as Professor Davis regarding the question involved in this case:

> "Clearly this area of the law is unsettled. The narrow 'legal wrong' rule of *Tennessee Electric* is still cited as authoritative in nonstatutory standing cases, but some courts have avoided the rule by stretching the statutes to find a congressional intent to protect the plaintiff from competition. The result, as the banking cases illustrate, is that similar cases produce opposite results in different courts. There probably will be no reconciliation of the divergent views in these cases until the Supreme Court has directly considered the continued validity of the *Tennessee Electric* doctrine and has decided the effect of the Administrative Procedure Act on the class of persons entitled to judicial review of administrative action." Note, *Diversification by National Banks*, 21 Stan. L. Rev. 650, 669 (1969).

The Note quoted above refers to certain subsidiary issues involved in the major question presented. The continued validity or applicability of *Tennessee Power Co. v. TVA*, 306 U.S. 118 (1938), in the law of standing must be considered. This Court in *Flast v. Cohen*, 392 U.S. 83 (1968), recently found it desirable to reconsider and partially overrule the earlier doctrine of *Frothingham v. Mellon*, 262 U.S. 447

(1923), regarding the standing of federal taxpayers to sue as taxpayers. Similarly, it is appropriate after thirty years to consider the extent to which the doctrine of the *Tennessee Power* case should continue to be viable.

Re-examination of *Tennessee Power* is especially appropriate in view of the approach taken in that case to the question of standing as contrasted with the approach recently adopted by this Court in *Flast v. Cohen.* In *Tennessee Power,* the Court took the conceptualistic, and perhaps circular, approach that a plaintiff's standing depends on the invasion of "legal rights" (306 U.S. 137). The *Flast* opinion, to the contrary, approaches the problem of standing in terms of realistic, factual considerations:

> "The 'gist of the question of standing' is whether the party seeking relief has 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.'" (88 S.Ct. 1952.)
>
> * * * * *
>
> "Thus, in terms of Article III limitations on federal court jurisdiction, the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution." (88 S.Ct. 1953.)
>
> * * * * *
>
> "There remains, however, the problem of determining the circumstances under which a federal taxpayer will be deemed to have the personal stake and interest that imparts the necessary concrete adverseness to such litigation so that standing can be conferred on the taxpayer *qua* taxpayer consistent with the constitutional limitations of Article III." (88 S.Ct. 1953.)

This Court should now re-examine the question of the standing of a competitor in terms of the realistic, factual approach utilized in *Flast* rather than in terms of the concep-

tualistic, doctrinaire "legal rights" approach utilized in *Tennessee Power.*

5. The present case also directly poses the important and unresolved question whether the common law of standing has been changed by the judicial review provisions of the Administrative Procedure Act, 5 U.S.C. §702 (Supp. II, 1967), which states that:

> "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

The Supreme Court has never determined whether this statutory language has enlarged the previous common law restrictions in the law of standing. Lower federal courts have disagreed on the question. Davis, *Standing: Taxpayers and Others,* 35 Chi. L. Rev. 601, 619-23 (1968); Note, *Diversification by National Banks,* 21 Stan. L. Rev. 650, 665-66 (1969). The instant case presents this issue in sharp focus and for this reason, aside from the others discussed previously, the present case should be reviewed. (This particular point was not argued in the court below as the Eighth Circuit has consistently held that the Administrative Procedure Act did not enlarge the scope of the prior law of standing, *Rural Elec. Admin. v. Northern States Power Co.,* 373 F.2d 686, 692 (1967). Other courts have held to the contrary, e.g., *American President Lines v. Federal Maritime Board,* 112 F. Supp. 346, 348-49 (D.D.C. 1953)).

CONCLUSION

Because of the direct conflicts between the decision of the court below and those of the First Circuit in the *Wingate Corp.* case and Fifth Circuit in the *Georgia Insurance Agents* case, and because of the importance of the question presented, both as it affects banking activities specifically and the federal law of standing in general, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

[OPINION]

Shanedling, Phillips, Gross & Aaron by Bert M. Gross and Felix M. Phillips, Esqs., appeared for plaintiffs.

Patrick J. Foley, United States Attorney, by Stanley H. Green, Esq., and C. Westbrook Murphy, Esq., of the Department of Justice, Washington, D. C., appeared for defendant Comptroller William B. Camp.

Kelly, Segell and Fallon by Fallon Kelly and Hyam Segell, Esqs., appeared for defendant American National Bank & Trust Company.

Matthew Hale, Esq., Washington, D. C., petitioned for leave to appear and file a brief amicus curiae on behalf of and as general counsel for The American Bankers Association, which petition the court granted.

NEVILLE, District Judge.

This matter comes before the court on motions by both defendants for an order of dismissal, grounded upon the alleged lack of standing in the plaintiffs to maintain the present action. Plaintiffs' complaint seeks a declaratory judgment, an injunction and compensatory damages, all on the theory that the marketing of data processing[1] to the public by defendant American National Bank is illegal and contrary to law. The complaint further avers that certain actions of the defendant Comptroller in approving the marketing of data processing services by national banks is "arbitrary, capricious, an abuse of discretion, in excess of statutory authority and illegal." The plaintiffs in essence seek a determination that the performing for a fee of data process-

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[1]As brought out in the oral arguments, data processing utilizes electronic devices, including what are commonly known as computers, to compile and calculate statistical information and is employed by businesses in the computation and preparation of payrolls, tax returns, monthly statements, bills and in other ways.

ing services by national banks for the public generally, or what were referred to on oral argument as "outsiders," is not within the scope of the powers and authority granted national banks under the National Bank Act as set forth in 12 U.S.C. §24. The pertinent provisions of this statute read as follows:

"§24. Corporate powers of associations.

Upon duly making and filing articles of association and an organization certificate a national banking association shall become, as from the date of the execution of its organization certificate, a body corporate, and as such, and in the name designated in the organization certificate, it shall have power—

. . .

Seventh. To exercise by its board of directors or duly authorized officers or agents, subject to law, *all such incidental powers as shall be necessary to carry on the business of banking;* . . ." (Emphasis added.)

The allegation in the complaint as to the defendant Comptroller's administrative ruling is in general terms as follows:

"7. The defendant COMPTROLLER has by ruling and other administrative action authorized defendant AMERICAN BANK and other national banks to perform the data processing services hereinafter described."[2]

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[2]It appears from the brief submitted by the Comptroller that his position with respect to the furnishing of electronic data processing services by national banks was published as an interpretive ruling in the March 1964 supplement to the *Comptroller's Manual for National Banks*, paragraph 3500 of which reads as follows:

"A national bank may make available for the use of others processing equipment acquired for the primary purpose of performing service incidental to banking."

A later modification of this same paragraph, adhered to by the present Comptroller, appears in the *Comptroller's Manual* (October 15, 1966 ed.) in the following language:

"Incidental to its banking services, a national bank may make available its data processing equipment or perform data processing services on such equipment for other banks and bank customers."

ocessing Service Or-

The plaintiff Association of Data P incorporated associa-
ganizations, Inc. ("ADAPSO"), is an ions located through-
tion of data processing service organiza are engaged in the
out the United States whose member rvice to the business
business of providing such type of se c. is a Minnesota cor-
community. Plaintiff Data Systems, In innesota, engaged in
poration with offices in Minneapolis, M ning data processing
the business of marketing and perfor nity, and is a member
service for the general business commu
of ADAPSO.

The alleged injury to these plaintif fs resulting from the
actions of the defendants is claimed to be solely an economic
injury arising from what is contended to be illegal competi-
tion.[3]

The plaintiffs assert that they have standing to challenge
the action of the Comptroller by virtu le of Section 10 of the
Administrative Procedure Act, 5 U.S .C. §701, et seq. The
pertinent section of this Act, §702, pr ovides that:

"A person suffering legal wrong because of agency ac-
tion, or adversely affected or aggrieved by agency ac-

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[3]Paragraph 11 of the complaint of plaintiffs charges:

"As a result of defendant Comptroller's action, the marketing of data processing services by national banks has been growing rapidly, and is anticipated to grow even more rapidly in the future. Because of the enormous financial power of national banks and their banking relationships with existing and potential customers for such services, the marketing of such services by national banks threatens ulitmately to exclude all ADAPSO members and other independent service organizations from all or a very substantial part of the market for the sale of data processing services."

The complaint goes on to allege that the plaintiff Data Systems had entered into negotiations in Minnesota with two particular potential customers to provide data processing service. It is stated that the defendant American National Bank and Trust Company subsequently made agreements with the same two potential customers for the performing of data processing service, thus depriving Data Systems of the right and opportunity to perform such service and to be compensated therefor.

> tion within the meaning of a relevant statute, is entitled to judicial review thereof. . . ."

Since there are no specific provisions in the National Bank Act providing for a review of the Comptroller's rulings or conferring standing to maintain such actions as the instant case, it would appear that if the plaintiffs are to have what is called statutory standing at all, such must be grounded upon the above-quoted portion of the Administrative Procedure Act. The Eighth Circuit Court of Appeals, however, has adhered strongly to the view that the Administrative Procedure Act did not by its passage create any legal rights which did not otherwise exist and has cited numerous authorities in support thereof. *Rural Electrification Admin. v. Northern States Power Co.*, 373 F.2d 686, 692 (8th Cir. 1967). Quoted particularly in this case is *Dube v. Schuetzle*, 303 F.2d 570, 574 (8th Cir. 1962), to the effect that:

> "It has also been judicially determined that the Administrative Procedure Act was not designed to and in fact has not changed the basic principle that one must have suffered a *legal wrong* in order to have standing to challenge programs administered by governmental agencies. (Citing many cases.)"

The result is that in determining whether or not plaintiffs have standing this case must be considered without there being in existence any statutory right to judicial review. That is to say, the National Bank Act does not have within itself any provisions for court review, such for instance as the Internal Revenue Code or the Interstate Commerce Act, and it is clear that the Administrative Procedure Act does not and did not append such in effect to this Act so as to create a specific provision for judicial review.

There is a long and well established line of judicial authority holding that plaintiffs whose only injury is loss due to competition lack standing to maintain legal action to redress

their economic injury. These decisions hold that mere competitive injury even though resulting from governmental action does not give standing to a person so injured to seek relief in the courts. *Alabama Power Co. v. Ickes,* 302 U.S. 464, 58 S.Ct. 300, 82 L.Ed. 374 (1938); *Tennessee Power Co. v. T.V.A.,* 306 U.S. 118, 59 S.Ct. 366, 83 L.Ed. 543 (1939); *Perkins v. Lukens Steel Co.,* 310 U.S. 113, 60 S.Ct. 869, 84 L.Ed. 1108 (1940); *Kansas City Power & Light Company v. McKay,* 225 F.2d 924 (D.C. Cir. 1955), *cert. denied* 350 U.S. 884, 76 S.Ct. 137, 100 L.Ed. 780 (1955); *Texas State AFL-CIO v. Kennedy,* 330 F.2d 217 (D.C. Cir. 1964); *Benson v. Schofield,* 236 F.2d 719 (D.C. Cir. 1956), *cert. denied* 352 U.S. 976; *United Milk Producers of New Jersey v. Benson,* 225 F.2d 527 (D.C. Cir. 1955); *Pennsylvania Railroad Co. v. Dillon,* 335 F.2d 292 (D.C. Cir. 1964); *Rural Electrification Admin. v. Central Louisiana Elec. Co.,* 354 F.2d 859 (5th Cir. 1966).

So in *Tennessee Power Co. v. T.V.A.,* 306 U.S. 118, 59 S.Ct. 366, 83 L.Ed. 543 (1939), the court laid down the rule that one threatened with injury by governmental action may not contest such in the courts "unless the right invaded is a legal right—one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege."

Plaintiffs in the case at bar have not lost nor had threatened any property interest (loss due to competition clearly not qualifying as such under the above cases); they do not allege any contract breach nor tortious action and it is clear as above set forth that neither the National Bank Act nor the Administrative Procedure Act are statutes conferring any specific privilege on plaintiffs. Plaintiffs do not have any governmentally granted license or franchise which is impaired by defendants' actions.

No purpose will be served in this opinion by reviewing the

detailed facts of the above cited cases. Their rationale seems to be this: The United States is a country dedicated to free enterprise. If A invests his money in a business, a grocery store for instance,[4] he cannot complain legally if another man B opens next door to him and he, A, loses his investment because of the competition. Economic injury due to competition is not an actionable legal wrong. Even assuming that B did not file proper incorporation papers or income tax returns, or borrowed his money from someone who lent it to him ultra vires, or agreed to pay usurious interest for borrowed money, or obtained his groceries illegally, still A as a competitor has suffered no judicially cognizable wrong.[5] The

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[4] In *Alabama Power Co. v. Ickes*, 302 U.S. 464, 481 (1938), the court said:

"John Doe, let us suppose, is engaged in operating a grocery store. Richard Roe, desiring to open a rival and competing establishment, seeks a loan from a manufacturing concern which, under its charter, is without authority to make the loan. The loan, if made, will be *ultra vires*. The state or a stockholder of the corporation, perhaps a creditor in some circumstances, may, upon that ground, enjoin the loan. But may it be enjoined at the suit of John Doe, a stranger to the corporation, because the lawful use of the money will prove injurious to him and this result is foreseen and expected both by the lender and the borrower, Richard Roe? Certainly not, unless we are prepared to lay down the general rule that A, who will suffer damage from the lawful act of B, and who plainly will have no case against B, may nevertheless invoke judicial aid to restrain a third party, acting without authority, from furnishing means which will enable B to do what the law permits him to do. Such a rule would be opposed to sound reason, as we have already tried to show, and cannot be accepted."

[5] "The appellants further argue that . . . they may, by suit, challenge the constitutionality of the statutory grant of power the exercise of which results in competition. This is but to say that if the commodity used by a competitor was not lawfully obtained by it the corporation with which it competes may render it liable in damages or enjoin it from further competition because of the illegal derivation of that which it sells. If the thesis were sound, appellants could enjoin a competing corporation or agency on the ground that its injurious competition is *ultra vires*, that there is a defect in the grant of powers to it, or that the *means of competition* were acquired by some violation of the Constitution. The contention is foreclosed by prior decisions that the damage consequent on competition, otherwise lawful, is in such circumstances *damnum absque injuria*, and will not support a cause of action or a right to sue." *Tennessee Power Co. v. T.V.A.*, 306 U.S. 118, 139-40 (1939).

above reasoning applies where the competitor is the United States Government, i.e., in the public power field or more frequently where the government has enhanced competition by financial aid or grants to a competitor, even though the government may not have followed to the letter all of the requirements, or may have exceeded the restrictions and proscriptions of the Act of Congress creating or permitting its action.[6]

A further reason sometimes assigned for denying standing is that to allow such would permit some citizen or taxpayer who claimed a "public interest" or who desired to act as a "private attorney general" to challenge in court every action of the government.

Less than a year ago the Court of Appeals for the Eighth Circuit in a lengthy opinion adopted the rationale of the above cited cases. *Rural Electrification Admin. v. Northern States Power Co.*, 373 F.2d 686 (8th Cir. 1967), *cert. denied* 387 U.S. 945 (1967), ... S.Ct. ....., ... L.Ed.2d ..... This decision binds this court and thus requires a dismissal of plaintiffs' complaint.

Of the several cases relied on by plaintiffs, most of them are distinguishable and not applicable to the case at bar. Several relate to situations where the federal or state governments have recognized that a particular field of competition is subject to regulation and restriction as to the number who may engage in such business, i.e., where for the benefit of the public, totally free and unrestrained competition in the bank-

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6 ". . . When Congress has not given them any such standing by express or implied provision of statute * * *, mere economic competition made possible by governmental action (even if allegedly illegal) does not give standing to sue in the courts to restrain such action. . . . For purposes of standing in this case, the sufficiency of appellants' allegations of 'legal wrong' thus depend upon congressional intent to bestow upon them a legal right to protection from such competition." *Pennsylvania Railroad Co. v. Dillon*, 335 F.2d 292, 294-95 (D.C. Cir. 1964).

ing field, for instance, is not desirable and should be confined. So, when a plaintiff already has a license or franchise to engage in such a field of business, the prospective entry of another into the same field has been held to give plaintiff standing to demand judicial review. Accordingly standing has been allowed to challenge the Comptroller's action in chartering a new national bank or a new branch of a national bank. *National Bank of Detroit v. Wayne Oakland Bank*, 252 F.2d 537 (6th Cir. 1958); *Hoosier State Bank of Indiana v. Saxon*, 248 F. Supp. 233 (N.D. Ind. 1965); *Whitney Nat'l Bank v. Bank of New Orleans & Trust Co.*, 323 F.2d 290 (D.C. Cir. 1963); *Webster Groves Trust Co. v. Saxon*, 370 F.2d 381 (8th Cir. 1966). In these cases an existing bank was the challenger in a field where, for the benefit of the public, the number who are allowed in competition is limited. A grocery store or data processing company failure or bankruptcy would be unfortunate and cause the proprietors and owners to lose their investment, but a bank failure would cause not only loss of the owner's investment but also loss to many unwary members of the public who are depositors. For this reason competition is limited as to the number who can engage in this business. Thus in the interest of the public one already in this field has standing to challenge a proposed new entrant.

In accordance with this same general philosophy is *F.C.C. v. Sanders Bros. Radio Station*, 309 U.S. 470, 60 S.Ct. 693, 83 L.Ed. 869 (1940), allowing a competing radio station standing in the public interest to challenge an order granting a certificate to a new station.

The case of *Georgia Ass'n of Ind. Ins. Agents, Inc. v. Saxon*, 260 F. Supp. 802 (N.D. Ga. 1966), involved a section of the National Bank Act (12 U.S.C. §92) permitting the sale of insurance by national banks located in towns of 5,000 population or less. Insurance agents were allowed standing

judicially to question the Comptroller's ruling granting certain authority to write insurance by national banks in cities of any size, on the grounds that this statute by clear implication was intended to protect a class, i.e., certain insurance agents and representatives. Thus standing existed in any member of this class. There is no such statute protecting data processors.

In this same category is *Investment Company Institute v. Camp*, 274 F. Supp. 624 (D.D.C. 1967), where a national bank instituted a collective investment fund. Plaintiff association sought to restrain the Comptroller from authorizing such. Plaintiff was held to have standing in view of the specific wording of the National Bank Act which by its language segregated generally national commercial banking from the securities business, thus creating a protected class. Cf., *National Ass'n of Securities Dealers, Inc. v. Securities Exchange Commission* (Case #20,164, D.C. Cir. decided November 21, 1967), denying standing involving the same bank in a somewhat differing controversy.

As to *Baker, Watts & Co. v. Saxon*, 261 F. Supp. 247 (D.D.C. 1966), it can only be said that it seems contrary in its philosophy and holding to the Eighth Circuit holding in *Rural Electrification Admin. v. Northern States Power Co.*, 373 F.2d 686 (8th Cir. 1967), *cert. denied* 387 U.S. 945 (1967), ... S.Ct. ....., ... L.Ed.2d ..... Perhaps the same can be said of some of plaintiffs' other cases. Even those distinguished hereinabove fundamentally adopt or lean toward the *Baker, Watts, supra*, approach and rationale. *Webster Groves Trust Co. v. Saxon*, 370 F.2d 381 (8th Cir. 1966), as an Eighth Circuit case, predates *Rural Electrification Admin. v. Northern States Power Co., supra*, by slightly more than a year and though it has language which would seem to support plaintiffs' contentions, it was distinguished by the court itself in the *Rural Electrification Admin. v. Northern*

States Power Co. case and classified as illustrative of the type of case where an existing licensee in a regulated competitive field has standing where it offers to prove detriment to the public interest by the potential entrance of a new competitor.

Certain other cases are difficult to reconcile. As stated in *Rural Electrification Admin. v. Northern States Power Co.*, 373 F.2d 686, 692 (8th Cir. 1967):

> "Although concepts of standing, judicial reviewability and justiciable controversy are intermingled in the area of administrative review, our analyses compels reversal under any or all of these jurisdictional bases. Appellees' brief well demonstrates isolated statements and cases dealing with agency review are not all simply reconciled. . . ."

There is the view relied on by plaintiffs that actions of government officials ought to be rather freely judicially reviewable; that public officials ought to be subject to some rein by the court.[7] Davis in his textbook on ADMINISTRATIVE LAW, Chapter 22, and specifically §22.18 takes particular issue with the federal cases denying standing and sets forth in the Chapter numerous reasons therefor.

Apart from all of the above, the rule in this Circuit seems clear from the teachings of *Rural Electrification Admin. v. Northern States Power Co., supra.* Such binds this court.

A separate order granting defendants' motions to dismiss plaintiffs' complaint has been entered.

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[7]In *Whitney Nat'l Bank v. Bank of New Orleans*, 379 U.S. 411, 427, 85 S.Ct. 551, 13 L.Ed.2d 286 (1965), the dissenting justice (quoted in *Webster Groves Trust Co. v. Saxon, supra*) stated:

> ". . . absent a congressional design to bar all judicial review . . . injunctive relief is available where administrative remedies are either inapplicable or inadequate. This rule keeps the Comptroller from being a free-wheeling agency dispensing federal favors; and it gives some assurance that he will render principled decisions within the rule of law laid down by Congress."

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 19,218

Association of Data Processing Service Organizations, Inc., and Data Systems, Inc.,

Appellants,

vs.

William B. Camp, Comptroller of the Currency of the United States, and American National Bank and Trust Company,

Appellees.

Appeal from the United States District Court for the District of Minnesota.

[February 6, 1969.]

Before VOGEL, LAY and BRIGHT, Circuit Judges.

LAY, Circuit Judge.

Plaintiffs appeal from an order dismissing their complaint against the Comptroller of the Currency of the United States and the Minnesota domiciled American National Bank and Trust Company. One of the plaintiffs is Association of Data Processing Service Organizations, an incorporated association of data service organizations domiciled in Pennsylvania whose members perform data processing services throughout

the United States. It is hereinafter referred to as ADAPSO. The other plaintiff, Data Systems, Inc., is a Minnesota corporation engaged in the data processing business, with its principal place of business in Minneapolis. The complaint seeks equitable relief against the defendants and a "determination of the powers granted national banking associations under [the National Bank] Act as set forth in 12 U.S. Code §24." It is alleged that by administrative rule that Comptroller of the Currency has authorized national banks to perform data processing services for bank customers in violation of 12 U.S.C. §24 which gives national banks only "incidental powers as shall be necessary to carry on the business of banking." Plaintiffs allege that as a result of the unauthorized action ADAPSO members are threatened with the loss of a substantial part of the data processing market.[1] It is alleged that American National now performs data processing services for two companies with whom Data Systems had "negotiated" as prospective customers.

Jurisdiction is asserted by reason of an alleged federal question arising under the banking laws of the United States. 12 U.S.C. §§ 21 et seq. The trial court dismissed plaintiffs' complaint for lack of jurisdictional standing. We affirm.

The question of standing serves as a test of federal jurisdiction. Standing is the constitutional prerequisite related to whether a justiciable "case or controversy" exists. Involved is an examination to determine whether the plaintiffs have a personal stake legally sufficient "to assure that concrete adverseness" which avoids merely abstract determinations. *Flast v. Cohen,* 392 U.S. 83 (1968). See also *Aetna*

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[1]We need not decide whether ADAPSO as an association can properly allege "loss of competition" on behalf of its members when it is not engaged in the data processing business itself. See discussion, Jaffe, Judicial Control of Administrative Action 542-43 (1965).

Life Ins. Co. v. Haworth, 300 U.S. 227 (1937). Justiciability, although not always related to standing, becomes definitely attached when we consider whether the legal relationships of parties are such that they are aligned with adverse legal interests.

Plaintiffs assert standing in that they have been and will continue to be economically injured by *illegal* competition of the national banks. Whether a litigant has standing to challenge competitive injury has been the subject of extended litigation and discussion. Doctrinal rules have developed a maze of conceptualistic abstractions and theories which at times are viewed and applied as being indistinguishable one from another. See *Baker, Watts & Co. v. Saxon*, 261 F.Supp. 247 (D.D.C. 1966), aff'd sub nom., *Port of N. Y. Authority v. Baker, Watts & Co.*, 392 F.2d 497 (D.C. Cir. 1968); *Saxon v. Georgia Ass'n of Ind. Ins. Agents, Inc.*, 399 F.2d 1010, 1019 (5 Cir. 1968) (concurring opinion).[2]

The trial court here has observed that language in *Rural Elec. Admin. v. Northern States Power Co.*, 373 F.2d 686 (8 Cir. 1967) (denying standing)[3] and in *Webster Groves Trust Co. v. Saxon*, 370 F.2d 381 (8 Cir. 1966) (allowing standing)[4] seems to state divergent principles, either of which could govern in the instant case. However, all legal

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[2]See also extended discussion in 3 Davis, Administrative Law 208-294 (1958); Jaffe, Judicial Control of Administrative Action 500-531 (1965). And more recently, Davis, Standing: Taxpayers and Others, 35 U. Chi. L. Rev. 601 (1968).

[3]We stated in *Northern States*, 373 F.2d 692:

"Appellees readily recognize that the interest of the economic competitor is not sufficient standing to challenge the authority or discretion of the Administrator to make loans."

[4]We stated in *Webster Groves*, 370 F.2d 388:

"[W]hen a competitor believes he is being subjected to illegal competition owing to impropriety by the Comptroller, the courts should be open to hear and decide the alleged wrong."

principles must be qualitatively analyzed within the context of factual surroundings. Much of the confusion on standing seems to arise from the emphasis upon the issues to be adjudicated or upon the possible merits of the substantive claim rather than upon an examination of the *status* of the complaining plaintiff. Whether or not a defendant is alleged to be engaged in illegal competition cannot by itself determine a plaintiff's standing to complain. Cf. *Chicago v. Atchison, T. & S. F. Ry.*, 357 U.S. 77 (1958) and note 8 infra. Chief Justice Warren has stated, "The fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated." However, he added, ". . . it is both appropriate and necessary to look to the substantive issues for another purpose, namely, to determine whether there is a logical nexus between the status asserted and the claim sought to be adjudicated." *Flast v. Cohen*, 392 U.S. 83, 99, 102 (1968).

Whether a party may or may not challenge alledgedly illegal competition by others is best evaluated by examining the various factual circumstances within which the courts have discussed a particular plaintiff's standing and competitive injury.

Perhaps most well known are the so-called "power cases," where the threatened economic loss arises from government-created competition. In these situations the embryo of the competition by the defendant is generally found in congressional legislation. But even though the validity of such legislation is challenged, or an attack is made on the authority of a government agent to loan money, the courts uniformly have denied standing to competitors who otherwise possess

no legal right to be free from competition.[5] This group of cases is represented by *Tennessee Elec. Power Co. v. TVA*, 306 U.S. 118, 137 (1939), which early emphasized:

> "The appellants invoke the doctrine that one threatened with direct and special injury by the act of an agent of the government which, but for statutory authority for its performance, would be a violation of his legal rights, may challenge the validity of the statute in a suit against the agent. The principle is without application unless the right invaded is a legal right,—one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege."

See also *Rural Elec. Admin. v. Northern States Power Co.*, supra.

Secondly, in contrast to the "power" cases are situations where a plaintiff, possessing a public grant or contract to operate, seeks to prevent a competitor from entering into an area of regulated and *restricted* competition. Representative of these cases is *Frost v. Corporation Comm'n*, 278 U.S. 515 (1929). This court has applied the rationale of *Frost* to a suit by a state bank against the Comptroller to prevent illegal competition. *Webster Groves Trust Co. v. Saxon*, 370 F.2d 381 (8 Cir. 1966). As observed in *Whitney Nat'l Bank v. Bank of New Orleans & Trust Co.*, 323 F.2d 290 (D.C. Cir. 1963), rev'd on other grounds, 379 U.S. 411 (1965), involved is a property right arising out of a public charter which bestows a *legal* interest on a state bank to complain.[6]

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[5]In addition, even though the attack upon a government program to loan money is alleged to be illegal, this does not make the competition itself legally wrong. This is explained because "the borrower owes him [the plaintiff] *no obligation* to refrain from using the proceeds in any lawful way the borrower may choose." *Alabama Power Co. v. Ickes*, 302 U.S. 464, 480 (1938). (Emphasis ours.)

[6]The branch banking provisions of the National Bank Act make the establishment of branch banks subject to the law of the states. 12 U.S.C. §36. A primary purpose in doing so is to ensure competitive equality between state

Closely related but significantly different are those cases involving areas of competition which because of public interest find need of public licensing as opposed to a public grant or contract.[7] Here plaintiff-competitors are considered to be without a private "legal right" to protest unauthorized competition but nevertheless find standing by specific legislation as "aggrieved persons" to act in the public interest.

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and national banks. *First Nat'l Bank v. Walker Bank & Trust Co.*, 385 U.S. 252 (1966). It has accordingly been held that this provision gives state banks a sufficient legal interest to provide them with statutory standing to challenge the legality of branching by national banks. See *National Bank v. Wayne Oakland Bank*, 252 F.2d 537 (6 Cir. 1958), discussed in *Hoosier State Bank v. Saxon*, 248 F.Supp. 233 (N.D. Ind. 1965). The contrast between basing a state bank's standing on a "property right" arising out of its charter and standing by reason of its inclusion within the class intended to be protected by the National Bank Act is one without essential difference. Perhaps the most realistic approach is that the right indigenous to the charter is protected by the statute.

[7]The Court stated in *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 at 474 (1940):

> "In contradistinction to communication by telephone and telegraph, which the Communications Act recognizes as a common carrier activity and regulates accordingly in analogy to the regulation of rail and other carriers by the Interstate Commerce Commission, the Act recognizes that broadcasters are not common carriers and are not to be dealt with as such. Thus the Act recognizes that the field of broadcasting is one of free competition. The sections dealing with broadcasting demonstrate that Congress has not, in its regulatory scheme, abandoned the principle of free competition, as it has done in the case of railroads, in respect of which regulation involves the suppression of wasteful practices due to competition, the regulation of rates and charges, and other measures which are unnecessary if free competition is to be permitted.
>
> "An important element of public interest and convenience affecting the issue of a license is the ability of the licensee to render the best practicable service to the community reached by his broadcasts. That such ability may be assured the Act contemplates inquiry by the Commission, *inter alia*, into an applicant's financial qualifications to operate the proposed station.
>
> "But the Act does not essay to regulate the business of the licensee. The Commission is given no supervisory control of the programs, of business management or of policy. In short, the broadcasting field is open to anyone, provided there be an available frequency over which he can broadcast without interference to others, if he shows his competency, the adequacy of his equipment, and financial ability to make good use of the assigned channel."

See, e.g., *FCC v. Sanders Bros. Radio* ... *Station*, 309 U.S. 470 (1940); *Scripps-Howard Radio, Inc.* ... *v. FCC*, 316 U.S. 4 (1942). Cf. *Office of Communication* ... *of United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966). In these cases *Congress* has patently recognized nee... even though the competitive business ... ered free and otherwise unrestricted.[8]

Fourth, there are situations where ... ed for judicial review standing to challenge competition whi... s controlled is considlation of a statute, where the statute ... competitors are given acted for the express protection of t... which is allegedly in vio- complaining. The most recent exam... itself is said to be en- found in *Hardin v. Kentucky Util. Co.*, 390 U.S. 1 (1968).[9] the class of competitor ... mple of these cases is

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[8] But cf. *Chicago v. Atchison, T. & S. F. Ry.*, 357 U.S. 77 (1958). The Supreme Court recognized standing of a municipal ... al licensed public transportation system to intervene and attack the entry of one ... e seeking to compete in an alleged violation of a city ordinance. The Court ... rt made clear that standing of the intervenor could not be viewed from exa... examination of the merits as to whether in fact the competition was or was not ... hot illegal. Parmelee, the intervenor, for many years had enjoyed an arrangem... ment with the railroad to transport passengers between stations. Parmelee w... was notified of its termination. A competitor, Railroad Transfer Service, was su... subsequently given this business notwithstanding a city ordinance that prohibite... ited it from doing so without a license from the city. The Court found that Pa... Parmelee had "a direct and substantial personal interest in the outcome" and ... nd allowed standing. The ordinance was then held unconstitutional as being ... ing repugnant to the Interstate Commerce Act and the intervenor lost.

This case may best be categorized with th... those instances where standing to challenge illegal competition is implicitly fou... found within a legislative enactment, be it an existing ordinance or statute, va... valid or not. Cf. *Alton R.R. v. United States*, 315 U.S. 15, 19 (1942).

[9] The Supreme Court said:

> "This Court has, it is true, repeatedly held t... d that the economic injury which results from lawful competition cannot, in ... legality of any aspect of its com- on the injured business to question the lega... petitor's operations. *Railroad Co. v. Elle... llerman*, 105 U.S. 166 (1882); *Alabama Power Co. v. Ickes*, 302 U.S. 464 ... 64 (1938); *Tennessee Power Co. v. TVA*, 306 U.S. 118 (1939); *Perkins v. L... v. Lukens Steel Co.*, 310 U.S. 113 (1940). But competitive injury provided ... led no basis for standing in the above cases simply because the statutory ... y and constitutional requirements that the plaintiff sought to enforce were i... e in no way concerned with protecting against competitive injury. In con... contrast, it has been the rule, at

Plaintiffs' reliance on recent cases against the Comptroller fall within facile classification of this rule. See, e.g., *Baker, Watts & Co. v. Saxon,* 261 F. Supp. 247, supra, as explained in *Investment Co. Institute v. Camp,* 274 F. Supp. 624, 636 (D.D.C. 1967); *Saxon v. Georgia Ass'n of Ind. Ins. Agents, Inc.,* 399 F.2d 1010 (5 Cir. 1968).[10]

Fifth, the last group of "competition" cases relates to a plaintiff's unsuccessful challenge of a competitor's alleged *ultra vires* acts affecting plaintiff's non-regulated area of commerce. This factual setting is best illustrated by *Railroad Co. v. Ellerman,* 105 U.S. 166 (1882). In that case the plaintiff, who had contracted with the city of New Orleans to collect revenue from users of the city wharves, sought to enjoin a railroad company from operating wharves in New Orleans. He alleged this action would constitute illegal competition because the state statute authorizing the company to operate wharves was unconstitutional. The principle here furnishes an analogue to that in the "power cases" where the conduct of the defendant, although alleged to be illegal is nevertheless considered "lawful" with respect to

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least since the *Chicago Junction Case,* 264 U.S. 258 (1924), that when the particular statutory provision invoked does reflect a legislative purpose to protect a competitive interest, the injured competitor has standing to require compliance with that provision. See *Alton R. Co. v. United States,* 315 U.S. 15, 19 (1942); *Chicago v. Atchison, T. & S. F. R. Co.,* 357 U.S. 77, 83 (1958).

"Petitioners concede, as of course they must, that one of the primary purposes of the area limitations in §15d of the Act was to protect private utilities from TVA competition." *Hardin v. Kentucky Util. Co.,* 390 U.S. at 5-6.

[10]We do not share confidence in the alternative holding in *Saxon v. Georgia Ass'n of Ind. Ins. Agents, Inc.,* 399 F.2d 1010 (5 Cir. 1968), that outside the "statutory aid to standing" plaintiffs had "a legal right to protect themselves from unlawful competition." Id. at 1018. The emphasis that plaintiff's standing arises out of the allegation of "unlawful competition" as contrasted to "lawful competition" seemingly relates standing to the merits of the claim to be adjudicated rather than the status of a party to complain. For a similar critique, see Judge Thornberry's concurring opinion, 399 F.2d at 1020, n. 3.

the plaintiff because of the total absence of legal interest found in plaintiff's status.[11]

In summary, a plaintiff may challenge alleged illegal competition when as complainant it pursues (1) a legal interest by reason of public charter or contract, *Frost v. Corporation Comm'n*, supra, (2) a legal interest by reason of statutory protection, *Baker, Watts & Co. v. Saxon*, supra, or (3)

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[11]This is explained by Mr. Justice Matthews in *Railroad Co. v. Ellerman*, 105 U.S. at 173-174:

"The sole remaining question, then, is whether Ellerman, as assignee of the city, has any legal interest which entitled him to enjoin the company from using its wharf as a public wharf beyond the limits of such use, as defined by that construction of the joint resolution. If he has such interest, it can only consist in preventing competition with himself as a wharfinger, which such more extensive use of the railroad property would create. And if the right to assert it exists, it must rest, not upon the claim that the premises are thus used for purposes to which they might not be lawfully devoted if owned and used by a natural person, but on the allegation merely that such use is beyond the corporate powers of the company. But if the competition in itself, however injurious, is not a wrong of which he could complain against a natural person, being the riparian proprietor, how does it become so merely because the author of it is a corporation acting *ultra vires*? The damage is attributable to the competition, and to that alone. But the competition is not illegal. It is not unlawful for any one to compete with the company, although the latter may not be authorized to engage in the same business. *The legal interest which qualifies a complainant other than the State itself to sue in such a case is a pecuniary interest in preventing the defendant from doing an act where the injury alleged flows from its quality and character as a breach of some legal or equitable duty.* A stockholder of the company has such an interest in restraining it within the limits of the enterprise for which it was formed, because that is to enforce his contract of membership. The State has a legal interest in preventing the usurpation and perversion of its franchises, because it is a trustee of its powers for uses strictly public. In these questions the appellee has no interest, and he cannot raise them in order, under that cover, to create and protect a monopoly which the law does not give him. The only injury of which he can be heard in a judicial tribunal to complain is the invasion of some legal or equitable right. If he asserts that the competition of the railroad company damages him, the answer is, that it does not abridge or impair any such right. If he alleges that the railroad company is acting beyond the warrant of the law, the answer is, that a violation of its charter does not of itself injuriously affect any of his rights. The company is not shown to owe him any duty which it has not performed." (Emphasis ours.)

a "public interest" in which Congress has recognized the need for review of administrative action and plaintiff is significantly involved to have standing to represent the public, *FCC v. Sanders Bros. Radio Station,* supra. From this analysis, it seems clear that an allegation of "illegal competition" is not the balancing determinant of a plaintiff's standing. The primary search must rest on whether the plaintiff's status is one which enjoys a private interest entitled to protection or is one which the law recognizes to be of such legal significance to allow a party to act as a public representative for a public interest.

In the instant case the facts clearly place plaintiffs outside those cases which recognize standing. Plaintiffs are competing in a non-regulatory field of free competition. They possess no private legal interest nor do they plead any legal harm which is recognized at law. Their status is not one which places them within a class designedly protected by statute.[12] In direct accord see *Wingate Corp. v. Industrial Nat'l Bank,* 288 F.Supp. 49 (D.R.I. 1968); *Arnold Tours, Inc. v. Camp,* 286 F. Supp. 770 (D. Mass. 1968).

Plaintiffs' argument is in essence an equitable plea, that in effect they have a personal stake to pursue, even though not a legal one, but nevertheless one which makes them logical parties to protect the public interest from illegal actions of government agencies.

The problem with their plea is many-fold. Congress has not seen fit within the National Bank Act to recognize any

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[12]The Bank Act has never been construed to give a private litigant standing to complain concerning *ultra vires* acts of national banks relating to executed contracts. See *National Bank v. Matthews,* 98 U.S. 621 (1878). Although distinctive policy arguments exist for this rule, nevertheless there exists no legislative history nor do plaintiffs offer any serious contention that the National Bank Act was intended to give these private litigants standing to litigate alleged *ultra vires* activities of national banks. The reliance on the Bank Holding Company Act of 1966 and the Bank Service Corporation Act is misplaced. Neither act is applicable here.

"aggrieved person" to assert the public's rights. Congress has not expressed a public concern for protection as found in *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940), and its progenitors. Without a legal interest or the status of a recognized "aggrieved" party, the complaint resolves itself into an attempt merely to show "a common concern for obedience to law." *L. Singer & Sons v. Union Pac. R.R.*, 311 U.S. 295, 304 (1940). As pronounced in *Singer*, outside statutory consent, the general or common interest can find protection only in the standing granted to public authorities. Unless a relevant statute provides for a "party in interest" to seek judicial review or unless a complainant possesses a recognized legal interest, he lacks standing to be a "private attorney general" to represent the public interest. See *Kansas City Power & Light Co. v. McKay*, 225 F.2d 924 (D.C. Cir. 1955); *Braude v. Wirtz*, 350 F.2d 702, 707, 708 (9 Cir. 1965).[13]

Mr. Justice Frankfurter best describes judicial obligation to avoid review when legal standing is not otherwise involved:

> "The jurisdiction of the federal courts can be invoked only under circumstances which to the expert feel of lawyers constitute a 'case or controversy.' The scope and consequences of the review with which the judiciary is entrusted over executive and legislative action require us to observe these bounds fastidiously." *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 150 (1951) (concurring opinion).

Judgment affirmed.

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[13]See also our prior discussions concerning the applicability of the Administrative Procedure Act in *Rural Elec. Admin. v. Northern States Power Co.*, 373 F.2d at 692, n. 9.

APPENDIX C

(Judgment)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 19218. September Term, 1969

Association of Data Processing Service Organizations, Inc., and Data Systems, Inc.,

Appellants,

vs.

William B. Camp, Comptroller of the Currency of the United States, and American National Bank and Trust Company,

Appellees.

Appeal from the United States District Court for the District of Minnesota

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This cause came on to be heard on the record from the United States District Court for the District of Minnesota, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed.

February 6, 1969.

Costs taxed in favor of apppellee American Natl. Bank & Trust Co. for printing brief—$98.00.

Costs taxed in favor of appellee Wm. B. Camp, Comptroller, etc., for printing brief & suppl. brief & Appendix—$32.96.

APPENDIX D

5 U.S.C. §702:

"A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

12 U.S.C. §24:

"Upon duly making and filing articles of association and an organization certificate a national banking association shall become, as from the date of the execution of its organization certificate, a body corporate, and as such, and in the name designated in the organization certificate, it shall have power—

* * * * *

Seventh. To exercise by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of this chapter. . . ."

12 U.S.C. §1864:

"No bank service corporation may engage in any activity other than the performance of bank services for banks."

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 7192

ARNOLD TOURS, INC., ET AL.,
Plaintiffs-Appellants,

VS.

WILLIAM B. CAMP, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court
For the District of Massachusetts

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and

No. 7186

THE WINGATE CORPORATION,
Plaintiff-Appellant,

VS.

INDUSTRIAL NATIONAL BANK, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court
For the District of Rhode Island

Before ALDRICH, *Chief Judge,*
WOODBURY,* *Senior Circuit Judge,* and
COFFIN, *Circuit Judge.*

March 27, 1969.

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*Sitting by designation.

ALDRICH, *Chief Judge.* These are two actions by parties engaged in certain business pursuits to restrain competition from national banks which, supported by rulings of the Comptroller of the Currency, have entered their fields. Plaintiffs seek, basically, to attack these rulings. In both cases the district courts held that they were without standing to do so, and dismissed the complaints on motions of the defendants. Plaintiffs appeal.

THE TRAVEL AGENCY BUSINESS

We consider first the action brought by Arnold Tours, Inc. and some forty other independent travel agencies in Massachusetts, allegedly on behalf of others similarly situated as well as themselves, against the Comptroller and the South Shore National Bank. The bank, in reliance upon a ruling by defendant Comptroller's predecessor,[1] is engaging not merely in the financial aspects of travel, but "full" travel service, or a complete travel agency business. To quote from what is said to be the bank's own announcement, its employees are prepared to arrange for bicycles in Bermuda, villas on the Riviera, and houseboats in Kashmir. The Comptroller argues at length that this is traditional and legitimate bank activity. We do not, however, consider this matter except to say that plaintiffs present enough of an issue so that the question of standing is properly before us. We also note that no question of reviewability of the Comptroller's rulings has been raised. *See generally,* Saferstein, Nonreviewability: A Functional Analysis of "Committed to

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1 "¶7475. National banks acting as travel agents.

Incident to those powers vested in them under 12 U.S.C. 24, national banks may provide travel services for their customers and receive compensation therefor. Such services may include the sale of trip insurance and the rental of automobiles as agent for a local rental service. In connection therewith, national banks may advertise, develop, and extend such travel services for the purpose of attracting customers to the bank. See ¶7376."

Agency Discretion," 82 Harv. L. Rev. 367, 383 & n. 60 (1968). Our sole question is the correctness of defendants' contention, which we will paraphrase as saying that what the bank chooses to do is, both literally and figuratively, none of plaintiffs' business.

It has long been settled that an ordinary competitor has no standing to complain of a party's lack of legal authority to engage in his business, in a suit against the competitor, the government, or both. *Railroad Co. v. Ellerman,* 1881, 105 U.S. 166; *Alabama Power Co. v. Ickes,* 1938, 302 U.S. 464; *Tennessee Power Co. v. TVA,* 1939, 306 U.S. 118. Despite numerous exceptions, this principle has withstood erosion not only because of the traditional rationale behind standing doctrines generally, *see Flast v. Cohen,* 1968, 392 U.S. 83, 91-101, but because of the policy encouraging free and open competition—a policy that favors competition in the market place, not in the courts. The exceptions, where standing is recognized, are as well established as the principle itself. The first is for complaints of "illegal" competition, by which is usually meant competition that is unlawful as to plaintiff apart from considerations of corporate power or authority. *See Alabama Power Co. v. Ickes, supra* at 479; *Central Louisiana Elec. Co. v. REA,* W.D. La., 1964, 236 F.Supp. 271, 277, *rev'd,* 5 Cir., 354 F.2d 859, *cert. denied* 385 U.S. 815; *but cf. Kansas City Power & Light Co. v. McKay,* D.C. Cir., 1955, 225 F.2d 924, *cert. denied* 350 U.S. 884. Plaintiffs do not suggest that the Comptroller has sanctioned, or that the bank has undertaken, any unfair, conspiratorial, or criminal methods of competition, or that there has been any violation of the antitrust laws. The second exception is where it is claimed that some "legal right" has been injured, by which is meant, in its nonconclusory sense, that plaintiff has an independent property right, or a right to be free from the particular kind of competition he is challenging. Such a

right is attached to or arises out of an exclusive franchise, on the one hand, or a restricted license or the like, on the other. *Frost v. Corporation Commission*, 1929, 278 U.S. 515; *cf. Whitney National Bank v. Bank of New Orleans*, D.C. Cir., 1963, 323 F.2d 290, 299-300, *rev'd on other grounds*, 379 U.S. 411. Plaintiffs fit in no such category.

The final general exception is where the plaintiff can show the existence of a "statutory aid to standing" for a class of persons which includes himself. This statutory aid may take the form of a "judicial review" provision of the particular administrator in question for "parties aggrieved," "adversely affected," or the like. In such a case, *FCC v. Sanders Bros. Radio Station*, 1940, 309 U.S. 470, would presumably provide standing for legitimate competitors. *See generally, Jaffe, Judicial Control of Administrative Actions*, 513-31. There is, however, no such provision as to the Comptroller of the Currency. An alternative statutory aid may be found if there is an indication of Congressional intent, explicit or implicit, in the relevant substantive acts to grant protection to the competitive interests of a class of businesses which includes the plaintiff. Thus in *Hardin v. Kentucky Utilities Co.*, 1968, 390 U.S. 1, the Supreme Court found that a competing private utility company had standing to challenge the expansion of TVA into new areas in alleged violation of the area limitations of section 15d(a) of the Tennessee Valley Authority Act, 16 U.S.C. §831n-4 (a). The Court said, "[O]ne of the primary purposes of the area limitations in §15d of the Act was to protect private utilities from TVA competition. . . . Since respondent is thus in the class which §15d is designed to protect, it has standing . . . ." 390 U.S. at 6-7.

The only possible statutory aid to the standing of travel agents in national banking legislation exists in 12 U.S.C. §24(7). This section states that national banks may "exer-

cise . . . all such incidental powers as shall be necessary to carry on the business of banking," and then lists numerous powers explicitly granted. It has long been settled in suits over private contracts that the enumeration of such powers is an effective and strong prohibition of all activities not enumerated and not incidental to banking. *See First National Bank v. National Exchange Bank,* 1875, 92 U.S. 122, 128; *National Bank v. Matthews,* 1878, 98 U.S. 621, 625; *Logan County National Bank v. Townsend,* 1891, 139 U.S. 67, 73. But even assuming that national banks are prohibited by section 24(7) from entering into the business of procuring travel arrangements, this is not sufficient to provide a statutory aid to standing. The prohibition must be demonstrably intended to protect the competitive interests of other members of the prohibited business. *See* the concurring opinion of Judge Thornberry in *Saxon v. Georgia Ass'n of Independent Ins. Agents,* 1968, 5 Cir., 399 F.2d 1010, 1019; *Association of Data Processing Serv. Organizations v. Camp,* D. Minn., 1968, 279 F.Supp. 675, *aff'd,* 8 Cir. 2/6/69, ... F.2d ..... We, too, (see 8th Cir. opinion in *Camp,* n. 10), cannot accept the simplistic suggestion by the majority in *Georgia Ass'n,* 399 F.2d at 1016, that as soon as it appears that the competitive activities were unlawfully carried out the plaintiffs have standing.

The plaintiffs have not pointed to, nor have we in our research discovered, any evidence that Congress in delimiting the scope of banking activity in the ultra vires section, quoted *supra,* was concerned, in 1863 and 1864 when the national banks were formed,[2] with competitors in the businesses impliedly prohibited, much less in any particularity with travel agents (if they then existed). Rather, the limita-

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[2]National Bank Act of 1863, ch. 58, 12 Stat. 665; National Bank Act of 1864, ch. 106, 13 Stat. 99.

tions were for the purpose of insuring the stability, liquidity, and safety of the banks. *See National Bank v. Matthews, supra* at 626; Davis, Banking Regulation Today: A Banker's View, 31 Law & Contemp. Problems 639 (1966). *See also* Million, The Debate of the National Bank Act of 1863, 2 J. of Pol. Econ. 251 (1894). No doubt Congress has continuously, from 1864 to the present, been "very careful" (see *infra*) in restricting the activities of banks; and no doubt Congress has been, as we shall see in the second portion of this opinion, specifically concerned with certain potential competitors of the banks. But as Senator Proxmire pointed out while offering an amendment to banking legislation[3] specifically designed to protect particular competitors, the thrust of the close regulation of banks is for purposes of stability: "We are very careful in the regulations of banks. This has principally been done to assure the solvency of the banks by limiting the activities of banks to safe and relatively liquid investments." 108 Cong. Rec. 22031 (1962). *See also* S.Rep. No. 2105, 87th Cong., 2d Sess. (1962) (Supplemental views of Senators Proxmire, Douglas, and Neuberger) in 2 U.S. Code Cong. & Admin. News, 1962, at 3887. While at some point Congressional concern with a sufficient quantity of specific competitors of banks might indicate a Congressional intent that section 24(7) should now be read as a measure not only to protect investors but also to protect all potential members of prohibited activities, such a point has not been reached. More proof of Congressional solicitude is required before this court or any court should convert an economic struggle into a legal one.

The plaintiffs have suggested, however, that the general rule denying competitors standing is no longer valid, or

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[3]This legislation will form the basis of our holding in the second half of this opinion.

has undergone substantial change. First, they argue that section 10(a) of the Administrative Procedure Act, 5 U.S.C. §702 provides standing for any persons claiming to be "adversely affected in fact." This contention seems derived from the interpretation of section 10(a) urged by Professor Davis in his Administrative Law Treatise, §22.02, and presumably adopted in *American President Lines v. FMB*, D.D.C., 1953, 112 F.Supp. 346.[4] We, however, choose to side with Professor Jaffe[5] and the majority of the Courts[6] in holding that the passage of the APA was not intended to alter to such a drastic extent previous law on the question of standing. Moreover, we should add that we have serious reservations whether a test of "adversely affected in fact" would provide a simpler means of deciding the issue of standing. We do not pause for such analysis in the present case, but if, as has been suggested, simplicity and ease of determination is a reason for preferring the new interpretation, we do not find it.[7]

The plaintiffs alternatively urge that *Flast v. Cohen*, *supra*, indicates a major shift in the judicial attitude toward the general doctrine of standing; and that while it is not directly in point, this decision indicates that the relevant test for determining standing in this situation is whether

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[4]*See also Baker, Watts & Co. v. Saxon*, D.D.C., 1966, 261 F.Supp. 247.

[5]Jaffe, Judicial Control of Administrative Action 528-30. *See also* Note, Competitors' Standing to Challenge Administrative Action Under the APA, 104 U.Pa.L.Rev. 843 (1956).

[6]*See Saxon v. Georgia Ass'n of Independent Ins. Agents*, *supra*, at 1019, n. 1; *REA v. Northern States Power Co.*, 8 Cir., 1967, 373 F.2d 686, 692-93, and nn. 9-10, cert. denied 387 U.S. 945; *Kansas City Power & Light Co. v. McKay*, *supra*.

[7]Indeed, one of the bases for the rule against competitors' suits might well be the difficulty of determining whether mere increased competition is an injury in fact, particularly where a new and largely undeveloped market is involved. Cf. *World Airways, Inc. v. Northeast Airlines, Inc.*, 1 Cir., 1966, 358 F.2d 691.

the parties are sufficiently adverse to bring into focus the issues raised. *See also* the concurrence of Judge Thornberry in *Saxon v. Georgia Ass'n of Independent Ins. Agents, supra.* Our first response to plaintiffs' contention is that *Flast v. Cohen* was not intended to have any major reshaping effect outside the area of standing determinations under Article III for taxpayer suits challenging the constitutionality of a federal taxing and spending statute. Such an approach to standing as used in *Flast*—one focusing solely upon an assessment of the degree of adversity and clarity of the particular case—if applied to questions of administrative law standing would disturb the entire judicial relationship to the administrative as presently understood by Congress. Congress now knows that if it wishes a particular class of plaintiffs to have, or not to have, standing to seek review of agency rulings, it may make, or not make, the types of legislative provisions discussed earlier in this opinion, and that is an end to the matter. Under plaintiffs' proffered approach, the courts would have the last word on standing, based upon their view of the justiciability of the particular circumstances pleaded. When the conflict is one of constitutional dimensions, such an approach may be necessary. In purely administrative matters we think otherwise.

Our second answer is that even if we were to assume that *Flast v. Cohen* was intended to affect other areas, we do not read that case to require all administrative standing determinations to be made solely upon an assessment of the degree of adversity and clarity. Rather, *Flast* was concerned with reevaluating the standards for determining adversity and clarity in a situation where the relevant standing doctrine was adjudged to rest entirely upon such considerations. *Flast* is inapplicable when the standing doctrine in question rests upon a basis largely independent of the con-

cerns for adversity and clarity—namely, the limited role of the judiciary in regulating legitimate competition.

In sum, we find no acceptable basis for standing for the travel agents.

Data Processing

Turning to the second action involving the Comptroller, here plaintiff, Wingate Corporation, which performs certain data processing services for hire, brings suit to enjoin the defendant, Industrial National Bank of Rhode Island, from performing data processing services for the City of Providence, as sanctioned by a general ruling of the Comptroller. While Wingate, like Arnold, complains that the bank is violating section 24(7) of 12 U.S.C. by providing such services to bank customers, its claim to standing is aided by the presence of specific Congressional legislation dealing with banks and computer servicing. In 1962 Congress, after some debate, enacted the Bank Service Corporation Act, 76 Stat. 1132, which allowed small banks to combine to form a separate corporation which could own data processing equipment. The primary purpose of this legislation was to allow small banks to compete more effectively with the larger banks, which had sufficient capital and business to buy their own electric data processing equipment. However, in order to prevent such corporations being used as a subterfuge for entering into the nonbanking business of data processing, and to protect the interests of certified public accounting firms, Congress provided in section 4 of that Act, 12 U.S.C. §1864, "No bank service corporation may engage in any activity other than the performance of bank services for banks." The legislative history is clear. The prohibition originated in an amendment proposed by the National Society of Public Accountants, which objected to the original version of the bill that would have allowed bank service corporations to

solicit outside business to some extent. The Accountants feared injury to their growing business of bookkeeping with the aid of computers. The final provision was an obvious response. *See* 108 Cong. Rec. 16499, 22031 (1962); Hearings on Misc. Bank Bills Before the Comm. on Banking & Currency of the United States Senate, 87th Cong., 2d Sess., at 79-80 (1962).

We conclude that the present plaintiff is within the class of persons intended to be protected by section 4 of the 1962 legislation, and the only question is whether standing exists to complain not of competition from bank service corporations, but from national banks directly. We conclude in the affirmative. When Congress so explicitly provides protection for a particular business against competition from a regulated national entity—even though indirectly by regulating a subsidiary—standing exists at least to entertain complaints by that business concerning its competitive relationship to the national entity. Section 4 had a broader purpose than regulating only the service corporations. It was also a response to the fears, expressed by a few senators, that without such a prohibition, the bill would have enabled "banks to engage in a nonbanking activity," S.Rep. No. 2105, *supra* (Supplemental views of Senators Proxmire, Douglas, and Neuberger), and thus constitute "a serious exception to the accepted public policy which strictly limits banks to banking." (Supplemental views of Senators Muskie and Clark). We think Congress has provided the sufficient statutory aid to standing even though the competition may not be the precise kind Congress legislated against.[8]

Indeed, there is a plausible argument that the Bank Service Corporation Act, read in conjunction with 12 U.S.C.

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[8] *But cf. Association of Data Processing Serv. Organizations v. Camp*, 8 Cir., 1969, ... F.2d ...., n. 12, which stated that the reliance of similar plaintiffs upon the Act for standing was "misplaced."

§24(7), does in fact impliedly prohibit national banks from directly entering into the data processing service business. If the section four prohibition could be avoided by a small national bank, member of a group owning a service corporation, soliciting its own data processing customers to be serviced by the subsidiary via the bank, the prohibition would be largely illusory. And if a small bank could not directly solicit such customers, it would follow that the large banks, owning their own equipment, could not, or the equalizing effect of the Bank Service Corporation Act would be lost. To be considered in opposition to such an argument is the Comptroller's ruling interpreting the section,[9] and the phenomenon of the one-bank holding company, that is not covered by the Bank Holding Company Act of 1956, 12 U.S.C.§§ 1841-49, which requires only multi-bank holding companies to divest themselves of all nonbanking interests. We leave the resolution of this conflict to future determination. For the purposes of the issue of standing, we need decide only that the passage of the Bank Service Corporation Act arguably prohibits direct entry by national banks into the data processing service business.

In case No. 7192 the judgment of the District Court is affirmed.

In case No. 7186 the judgment of the District Court is vacated and the case remanded for further proceedings not inconsistent herewith.

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[9]Comptroller's Ruling ¶7399 provides in part that:

". . . such corporations may only perform bank services for banks. Bank services, however, as defined in the Act, would include any service which a bank would ordinarily perform for a customer. Accordingly, if a bank undertakes to handle the payroll accounts or the accounts receivable of a customer, a bank service corporation may perform for the bank the service necessary to enable the bank to fulfill its undertaking."